Office - Supreme Court, U. S.
FILED
AUG 13 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 328

UNITED STATES TRUST COMPANY OF NEW YORK and FRANCES SEYMOUR BROKAW, as Executors of the last Will and Testament of GEORGE TUTTLE BROKAW, Deceased,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND SUPPORTING BRIEF.

HARRY J. AHLHEIM,
Counsel for Petitioners,
No. 165 Broadway,
Borough of Manhattan,
City of New York, N. Y.

REEVES, TODD, ELY & BEATY,
Attorneys.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX

	Page
Petition for Writ of Certiorari	1
Summary Statement of Matter Involved	1
Statement of the Case	2
Questions Presented	5
Reasons Relied on for the Allowance of the Writ	6
Prayer	8
Brief in Support of Petition for Writ of Certiorari	9
Opinions Below	9
Jurisdiction	9
Statutes Involved	9
Statement of the Case	9
Specification of Errors	9
Summary of Argument	11
Argument:	
Preliminary Statement	12
Point I. Section 302(d) of the Revenue Act of 1926 excluded the 1929 *inter vivos* trust transfer from the operation of the Estate Tax Law. If the Amendment, Section 804 of the Revenue Act of 1932 is retroactively applied to reach said transfer, it is arbitrary and oppressive and in violation of the Fifth Amendment of the Constitution	13
Point II. Congress did not intend the Amendment, Section 804 of the Revenue Act of 1932 (restricting consideration for a transfer) to have retroactive effect upon a transfer made in 1929	18
Rules of Construction	19
House Committee Report	20
Point III. The consideration for the trust transfer was not a relinquishment by the wife of any dower or other marital rights in the decedent's property or estate, within the meaning of Section 804 of the Revenue Act of 1932	23
Conclusion	27
Appendix	28

CITATIONS.

Page

Cases:

Barnes v. *Klug*, 129 App. Div. 192, 195 ..... 14, 23
Blodgett v. *Holden*, 275 U. S. 142 ..... 17, 19

Cloister v. *United States*, 100 F. (2d) 355 20
Commissioner v. *Kelly's Estate*, 84 F. (2d) 958, 964, Cert. denied 299 U. S. 613 15
Coolidge v. *Long*, 282 U. S. 582 ..... 7, 18
Corporation of America v. *McLaughlin*, 100 F. (2d) 72 20

Empire Trust Co. v. *Commissioner*, 94 F. (2d) 307 26

Galusha v. *Galusha*, 116 N. Y. 635, 643 ..... 13, 14
Gewirtz v. *Gewirtz*, 189 App. Div. 483 15
Gould v. *Gould*, 245 U. S. 151 20
Greenfield v. *Greenfield*, 161 App. Div. 573, 575 ..... 14, 15
Grissler v. *Grissler*, 209 App. Div. 480 15

Hagger Co. v. *Helvering*, 308 U. S. 389, 400 20
Hassett v. *Welch*, 303 U. S. 303 ..... 7, 18, 19, 20
Helvering v. *City Bank Co.*, 296 U. S. 85, 89 ..... 7, 15, 16, 18
Helvering v. *Fuller*, 60 Sup. Ct. Rep. 784 25
Helvering v. *Helmholz*, 296 U. S. 93, 98 ..... 7, 18
Helvering v. *Lazarus*, 308 U. S. 252, 255 20
Humphrey's Executor v. *United States*, 295 U. S. 602, 624 22

Jacobus v. *Colgate*, 217 N. Y. 235, 240 19

Lewellyn v. *Frick*, 268 U. S. 238 ..... 17, 20

Meyer v. *Helvering*, 110 F. (2d) 367 26

Newman v. *Dore*, 275 N. Y. 371 25
New Colonial Ice Co. v. *Helvering*, 292 U. S. 435 26
Nichols v. *Coolidge*, 274 U. S. 531, 542 ..... 7, 18

Pye v. *Pye*, 167 App. Div. 951 15

Rice v. *Andrews*, 127 Misc. 826 14

Shwab v. *Doyle*, 258 U. S. 529, 534 19
Stone v. *White*, 301 U. S. 532 20
Sweeney v. *Sweeney*, 42 Nev. 431 25

United States v. *Great Northern Railway Co.*, 287 U. S. 144, 154 22
United States v. *Magnolia Co.*, 276 U. S. 160, 162 19
United States v. *Mitchell*, 74 F. (2d) 571 15

Welch v. *Henry*, 305 U. S. 134, 147, 148 17
White v. *Poor*, 296 U. S. 98, 101, 102 ..... 7, 18
Wilson v. *Hinman*, 182 N. Y. 408, 412 ..... 14, 23
Winter v. *Winter*, 191 N. Y. 462, 470 14
Woolford Realty Co. v. *Rose*, 286 U. S. 319 26

APPENDIX.

Page

Statutes:

Revenue Act of 1926, c. 27, 44 Stat. 9: Sec. 302 (U. S. C., Title 26, Sec. 411) 28

Revenue Act of 1932, c. 209, 47 Stat. 169: Sec. 804 (U. S. C., Title 26, Sec. 412) 28, 29

Miscellaneous:

Report No. 708 of the Ways and Means Committee to the House of Representatives, 72nd Congress, First Session, Pages 46, 47, 48..... 29, 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

UNITED STATES TRUST COMPANY OF NEW YORK and FRANCES SEYMOUR BROKAW, as Executors of the last Will and Testament of GEORGE TUTTLE BROKAW, Deceased,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

This Petition of United States Trust Company of New York and Frances Seymour Brokaw, as Executors of the last Will and Testament of George Tuttle Brokaw, deceased, by their attorney, Harry J. Ahlheim, seeking review by Writ of Certiorari of a decision of the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

Summary Statement of Matter Involved.

This application involves a Federal Estate Tax in the sum of $73,403.61, assessed against the Estate of George

Tuttle Brokaw, who died testate on May 28, 1935, a citizen and resident of the City, County and State of New York. The sole issue (R. 99) is whether the corpus of an *inter vivos* trust, established by him in 1929 (valued at $312,884.47 at the time of his death), was includible in his gross estate, under Section 302(d) of the Revenue Act of 1926 as more particularly amended by Section 804 of the Revenue Act of 1932 (see Appendix, *infra*). This application involves the construction and constitutionality, as applied, of said Section 804.

The Board of Tax Appeals excluded said trust fund from the gross estate, for the reason that there was an adequate and full consideration in money or money's worth for the trust transfer (R. 74). The Circuit Court of Appeals reversed the order of the Board and remanded the cause (R. 107).

Statement of the Case.

The material facts as stipulated (R. 89-99, 14-65) and found by the Board of Tax Appeals (R. 68-71), are as follows. The decedent died on May 28, 1935, survived by his first wife, Ann Clare Brokaw, and their infant daughter, Ann Clare Brokaw, ten years of age. He was at all times a resident of the State of New York (R. 90).

He and his first wife entered into a Separation Agreement on January 31, 1929 (R. 28-36). Among other things he agreed to pay her $2,500 per month for the term of her life, or at his option, to establish a trust in the principal sum of $425,000, the income of which should be payable to her during her life. She agreed that out of said payments, she would support herself and would assume the support of their daughter while the daughter resided with her. It was particularly agreed that he should not be required to

make any further payments for maintenance and support (except as to the daughter's school charges, medical bills, etc.). She expressly released and discharged the husband from all further liability, and also expressly agreed to indemnify and hold him harmless against any additional claim or liability. The amount of $2,500 per month was fixed by the parties as the amount reasonably required for the maintenance and support of the wife and daughter, and the parties contemplated that about one-third of the amount would be devoted to the maintenance and support of the daughter during her minority. By the Separation Agreement, he sought to make financial provision for the satisfaction and discharge of his legal obligation to support the wife and daughter (R. 92). The form of the trust agreement was submitted and approved by both parties, when the Separation Agreement was executed and delivered (R. 92).

After January 31, 1929, the wife instituted an action for divorce in Nevada and obtained an absolute decree of divorce on May 20, 1929. Said decree ratified and approved the Separation Agreement (R. 37-40), but the Court reserved jurisdiction to modify the provisions for the maintenance and support of the daughter during her minority, should it at any time appear necessary and proper to do so. There has been no such necessity (R. 95).

The husband paid said monthly sum of $2,500 up to and including May, 1929. Thereafter and on June 12, 1929, he exercised his option and delivered the Trust Agreement, together with securities having a fair market value of $414,324.50, to Trustees; the husband guaranteed no fixed amount of income, and the wife accepted the trust in lieu of all other payments to be made to her by the husband (R. 70-71, 97). In addition to the life income, the wife was

given a power of appointment by Will over $200,000 of the corpus (R. 44). The Trust Agreement contained a provision that the husband and his wife might jointly terminate, change, modify or revoke the trust, in which event the trust property should pass as he and she jointly directed (R. 51). It is this provision which brought the trust transfer within the possible scope of Section 302(d) of the Revenue Act of 1926.

At the time of the establishment of the trust, the decedent owned and possessed property having a fair market value of upwards of $1,425,000, including the securities ($414,324.50) which constituted the trust fund. The establishment of the trust was a bona fide transaction and was not intended to serve as a means or device to evade the imposition of any Estate Tax (R. 98). When the trust was established, the wife was twenty-six years of age and the daughter was four and one-half years of age. The then value of an annuity of $30,000 (being at the rate of $2,500 a month) payable to a person then twenty-six years of age, was $529,794.12. The securities constituting the trust fund had a fair market value of $312,884.47 at the date of the decedent's death. The Commissioner included that amount in the gross estate.

The Board of Tax Appeals, on the other hand, excluded said trust fund from the gross estate, upon the ground that the husband's obligation to support the wife and child would cease on his death, that her release of his obligation to support her and her assumption of the child's support were an adequate and full consideration in money's worth for the revocable trust transfer, and that the said consideration was not a relinquishment of any marital right in decedent's property or estate (R. 68-74).

The Circuit Court recognized that the 1929 transfer was made for a consideration in money's worth. However, it reversed the order of the Board, and held that a part (to be determined) of said trust fund should be included within the decedent's taxable estate, upon the ground that the consideration for the establishment thereof was (as to the wife's support) a relinquishment of a marital right in the decedent's property or estate, within the meaning of Section 804 of the Revenue Act of 1932, amending said Section 302(d). As to the balance of said trust fund (found not taxable), the Circuit Court of Appeals held that it would be necessary to determine the prospective yearly cost of the child's support when the trust was set up in 1929, and that a proportion of the trust fund based upon that cost should accordingly be excluded from the taxable estate, because to that extent the decedent received an adequate and full consideration in money or money's worth—in view of the fact that the wife agreed to assume the decedent's obligation to maintain and support the child during her minority (R. 103-107).

Questions Presented.

1. Whether Section 804 of the Revenue Act of 1932 (amending the Revenue Act of 1926) restricting the character of consideration, should be construed to apply to the trust transfer made in 1929, prior to the enactment of said Section.

2. If so applied, whether said Section 804 is not arbitrary and oppressive and in violation of the Fifth Amendment.

3. Whether Congress intended that said Section 804 should have retroactive effect upon a trust transfer made in 1929.

4. Whether said Section 804, amending Section 302(d) of the Revenue Act of 1926, should be construed to apply to the facts involved in the case at bar.

5. If so applied, whether the consideration for the trust transfer was of such character as to require the inclusion of part of said trust corpus in the decedent's gross estate at the time of his death on May 28, 1935.

6. Whether said revocable trust transfer was not governed solely by said Section 302(d), and whether the trust property was not thereby excluded from the decedent's gross estate for tax purposes, for all time.

7. Petitioners also reserve the right to review the Court's determination as to the measure, proportion and amount of the fund, to be excluded from the gross estate.

Reasons Relied On for the Allowance of the Writ.

1. The case involves important questions in the interpretation, construction and applicability of the Federal Estate Tax law which have not heretofore been decided by the Supreme Court, but which in the public interest and for the correct administration of the Federal Revenue laws, should now be settled and determined. The statute involved is Section 302(d) of the Revenue Act of 1926, as more particularly amended by Section 804 of the Revenue Act of 1932.

2. Section 302(d) of the Revenue Act of 1926 excluded from the decedent's taxable estate, a revocable trust transfer of property, resting upon an adequate and full consideration in money's worth. The Circuit Court of Appeals has decided that Section 804 of the Revenue Act of 1932 should be retroactively applied to a 1929 transfer, so as to

bring said property back into the decedent's taxable estate at his death. Said decision has decided an important question of Federal Law in a way probably untenable or in conflict with the applicable decisions of this Court, which question should now be settled by this Court. In the recent case of *Hassett* v. *Welch*, 303 U. S. 303, this Court considered the 1931 and 1932 amendments to Section 302(c) of the Revenue Act of 1926, and held that said amendments might not be retroactively applied to a trust transfer made prior to 1931. It was held that the death of the transferor after 1931 did not serve to make the transfer a taxable one. Furthermore, the decisions of this Court in the following cases indicate that said Section 804 may not be retroactively applied to a transfer made in 1929; and that the retroactive application of said Section 804 would be a violation of the Fifth Amendment. This important question of Federal Law should now be settled by this Court. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Coolidge* v. *Long*, 282 U. S. 582; *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89; *Helvering* v. *Helmholz*, 296 U. S. 93, 98; *White* v. *Poor*, 296 U. S. 98, 101, 102.

3. The case of *Helvering* v. *City Bank Co.*, 296 U. S. 85, involved the taxability of a revocable transfer in trust, made without consideration. However, this Court has not yet passed upon the question as to the effect of a revocable transfer, resting upon a proper consideration, and whether property so transferred, is excluded from the settlor's estate for all time.

4. The question as to the construction, scope and interpretation of said Section 804 and of the term "marital rights in the decedent's property or estate" is an important question of Federal Law which has not but which should be settled by this Court.

5. A decision of the questions involved in this case is desirable in order to remove the resulting confusion in the construction, interpretation and administration of said Section 302(d) as amended by said Section 804.

Prayer.

WHEREFORE PETITIONERS RESPECTFULLY PRAY that this Honorable Court review by Writ of Certiorari, directed to the United States Circuit Court of Appeals for the Second Circuit, the Decision and Decree of said Court in the case numbered and entitled on its Docket as No. 266, October Term 1939, "Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, against United States Trust Company and Frances Seymour Brokaw, Executors of the last Will and Testament of George Tuttle Brokaw, Respondents", and that all things necessary and incident thereto, including certification and transmission to this Court, of transcript of the Record and all proceedings in said Circuit Court of Appeals be done, and that said Decree and Judgment of the Circuit Court of Appeals may be reversed in so far as the same is adverse to your petitioners, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, New York, August 12, 1940.

HARRY J. AHLHEIM,
Counsel for Petitioners.

REEVES, TODD, ELY & BEATY,
Attorneys.